(1)

Supreme Court, U.S.

05-1420 MAY 4 - 2006

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

DOLORES C. PINO, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff in a Federal Tort Claims Act (FTCA) action for hearing damage caused by a forceful air pressure wave hitting her body as she walked home in her residential neighborhood, with the only things around at the time that could cause such a strong air pressure wave being jet aircraft taking off from and landing at O'Hare airport and the definite possibility of a military jet flying supersonically high above, who was not able to determine specific causation, is entitled to use the *res ipsa loquitur* inference of negligence.

2. Whether a proposed amendment to a negligence complaint which changes the manner of the breach of duty of care to conform to the evidence and anticipate the use of the *res ipsa loquitur* inference at trial constitutes a new claim barred by Federal Rule of Civil Procedure 15.

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Dolores C. Pino, *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., is not reported. The opinion of the district court, App., is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2005. The petition for rehearing *en banc* of the Petitioner was denied on February 3, 2006, App. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The notifications required by R. 29.4 have been made.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are set forth in an appendix to the petition. App.

STATEMENT OF THE CASE

This case presents an important question on the use of the *res ipsa loquitur* doctrine in relation to the liability of the federal government under the FTCA for personal injury – hearing damage – caused by excessive jet noise in the national system of aircraft noise control over which it has asserted its full control through preemption. The occurrence involved a strong air pressure wave hitting a pedestrian when the only things around at the time of occurrence were aircraft taking off from and landing at O'Hare Airport and the definite possibility of a military jet flying supersonically high above.

The court of appeals and district court, the final decision of which was denying plaintiff's motion for reconsideration of the original district court decision, held that the plaintiff was not entitled to use the *res ipsa loquitur* doctrine to meet the proximate cause element of the negligence cause of action under the FTCA, and denied her motion for leave to file a second amended complaint seeking a change in the manner of breach of duty of care by the federal government, holding the change would have added a new claim.

Under the FTCA, the United States may be liable for torts of federal employees acting within the scope of their employment, "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C.A. §§ 2674, 1346(b)(1).

In Illinois, a plaintiff is entitled to the *res ipsa loquitur* inference of negligence if the "thing which caused the

injury is shown to be under the control or management of the party charged with negligence," and if "the occurrence is such as in the ordinary course of things would not have happened if the person so charged had used proper care." *Neace v. Laimans*, 951 F.2d 139, 141 (7th Cir. 1991), citing *Metz v. Central Ill. Electric & Gas Co.*, 32 Ill.2d 446 (1965).

This case also presents an important question of federal civil procedure regarding whether a plaintiff may amend the manner of breach of duty of care originally plead in a negligence cause of action without violating the federal pleading requirements, the court of appeals and district court having held such an amendment is barred.

REASONS FOR GRANTING THE PETITION

1. The petition presents an important question relating to the protection of the public safety, which the Seventh Circuit decided in ways which conflict with relevant decisions of this Court.

Plaintiff's body was hit from the right side and then engulfed by a large, forceful air pressure wave as she walked southbound to her home on a very humid and misty night in Morton Grove on February 5, 2001 at approximately 9:25 p.m. Pl.'s Ex. A. She felt intense pain inside her head as well as loud ringing in her right ear immediately upon the air pressure wave hitting her, and then intermittent pain for almost two years afterward. *Id.* The loud ringing (tinnitus) in her right ear has been constant from that moment. *Id.* As the air pressure wave hit the Plaintiff, she also heard a plane directly over her head, which seemed quite low and close to her. *Id.*

This occurrence happened amid a pattern of great amounts of jet noise from O'Hare Airport over the Plaintiff's residence and neighborhood for several years prior to the date of the occurrence. *Id.* Plaintiff kept a diary of these jet noise disturbances and complained about them to the City of Chicago, operator of O'Hare. *Id.* Plaintiff wrote down the time of the occurrence in her datebook when she reached her residence right afterward. *Id.* She sought medical care for the loud tinnitus in her right ear. *Id.*

She obtained the list of flights for that several hour period on February 5, 2001 from the City of Chicago's records a year and a half later, which contained one United Airlines plane departing O'Hare at a time that exactly matched the time she wrote down in her date book. *Id.* The official weather data she obtained several years later confirmed the high humidity of that evening. Pl.s Ex. K.

Nationally, airports and the number of jet aircraft flying in populated areas have been under constant expansion for years, with current plans by the FAA and the private airline industry for the expansion of thousands of airports, including O'Hare Airport. Tens of thousands of people in the U.S., therefore, remain at risk of injury or having their property damaged from excessive jet noise (including from the form of jet noise at issue in this case, air pressure waves).

The Seventh Circuit decision denied plaintiff here the use of the *res ipsa loquitur* inference of negligence because she was unable to specifically recreate how the planes around her at the time generated the air pressure wave that hit her, and held that the fact finder must have personal knowledge of such an occurrence for the use of the *res ipsa loquitur* doctrine at trial.

But it is difficult to envision how a plaintiff injured or a person whose property was damaged by jet-created air pressure waves could ever provide evidence of specific causation of such an event, or how enough people in the jury pool could obtain personal knowledge of the type of specific occurrence here to satisfy the Seventh Circuit and district court's test. Other authoritative legal sources state that it is only general life experience with the occurrence at issue that is required for the use of the *res ipsa* inference. The Seventh Circuit's holding, if repeated, would make it very difficult to bring negligence suits against the federal government and the owners of the jet aircraft for injuries or property damage caused by such jet aircraft-generated air pressure waves.

a. The Seventh Circuit decision directly contravenes the decisions of this Court on the use of the res ipsa loquitur evidentiary doctrine.

The Seventh Circuit panel decision contains the following statement in the third paragraph at 2 (emphasis added):

> While we must draw all reasonable inferences from the evidence in Pino's favor, [citation omitted] we do not think the causation sequence that Pino suggests is one that a layperson can reasonably infer based on personal knowledge [citation omitted]. Pino has not asserted that she is an expert on the causes of air pressure waves, nor has she presented an expert witness to say that *air pressure waves arise only from aircraft under negligent control.*

First, this passage contains the holding that for the Plaintiff to survive summary judgment, her evidence had to exclude all explanations for the cause of the occurrence (creation of the air pressure wave) other than the defendant's negligence. This holding violates the legal precedent of negligence causation, that a plaintiff need not exclude all but the defendant's negligence to absolute certainty, but only needs enough evidence to lead to a reasonable inference that the defendant's negligence is the more probable explanation. *Musgrave v. Union Carbide Corp.*, 493 F.2d 224 (7th Cir. 1974) (proof of negligence or causation need not be established by testimony so clear that it excludes every other speculative theory); *McInturff v. Chicago Title & Trust Co.*, 102 Ill. App. 2d 39 (1968) (causal relation between alleged negligence and injury must be established by a preponderance of the evidence and with reasonable certainty).

Second, this passage contains the holding that the fact finder must have "personal knowledge" of the occurrence at issue in order for a plaintiff to be allowed the *res ipsa loquitur* inference, but this is an incorrect legal rule. The knowledge required is only general experience in life, not first-hand personal knowledge of the specific occurrence in a case. *See* Dan B. Dobbs, The Law of Torts, Vol. 1, "Substitutes for Factual Evidence, Res Ipsa Loquitur, Estimating the Probabilities of Negligence" at 373 (2001):

> it is only general experience in life that is required, not experience with the particular accident. So jurors have been permitted to conclude that when a modern airplane crashes without explanation and no other cause appears likely, that the operator of the plane was negligent, even though the jurors

themselves are not pilots and have no actual data on the subject of air-crash negligence.

In this case, the primary facts regarding the causation of the air pressure wave involve matters which are readily available and known to the general public – wake vortices and sonic boom shock waves, since they are covered in much aviation-related information on plane crashes and sonic boom events in the media, newspapers and television news programs. The fact-finder in this case should be able to use this common understanding and common sense to comprehend the basic aspects of these matters from Plaintiff's evidence well enough to draw correct conclusions without the aid of the testimony of wake vortex experts or sonic boom shock wave experts.

Third, this holding violates the bedrock rule of tort law that the cause of the occurrence is to be determined within the context in which it occurs, not taken from those circumstances and considered in isolation or in the theoretical realm. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U.S. 469 (1876) (the proximate cause of an injury is ordinarily a question for the jury, not a question of science or legal knowledge, and "is to be determined as a fact in view of the circumstances of fact attending it.") The Seventh Circuit panel decision's holding that the Plaintiff had to prove that "air pressure waves arise only from aircraft under negligent control" removed the consideration of the event that injured the Plaintiff from the circumstances and reality in which it occurred – a residential neighborhood on an otherwise uneventful evening – and took it to the realm of isolated theory – where placing it into other circumstances may well show the government was clearly not negligent, such as when military jets fly supersonically at air shows and create sonic

boom shock waves in a controlled, careful way like at the Chicago lakefront every summer, or like during the exigencies of the months just after the Sept. 11, 2001 when a military jet chased a passenger jet near O'Hare and created a sonic boom shock wave which hit the ground in the residential suburb of Arlington Heights, which the Defendant's attorney referenced in her summary judgment documents. To take the creation of the air pressure wave out of the specific facts and circumstances of this case is prohibited by the rules of tort law.

Fourth, the Seventh Circuit's holding here that the Plaintiff had to prove that "air pressure waves arise only from aircraft under negligent control" violates the binding legal precedent that plaintiffs may use circumstantial evidence to prove their cases. *E.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003). *Imig v. Beck*, 115 Ill.2d 18 (1986) ("*res ipsa loquitur* raises an inference of negligence from otherwise inexplicable facts by allowing proof of general negligence through circumstantial evidence"). The Plaintiff was entitled to use the facts that the air pressure wave hit her, that there was nothing other than planes around at the time that could cause air pressure waves, and that the Defendant committed the negligent acts and omissions regarding its duty of care in the system of jet noise control, summarized in Pl.'s Brief at 35-36 (total failure to measure jet noise in her neighborhood despite harmful and increasing levels of jet noise in the area, Pl.'s Ex. M, I; total failure to do anything about highly humid days – close to 100%, such as the day at issue, when it is widely known that greater levels of noise reach the ground on such days, Pl.'s Ex. J, K, P; failure to implement a noise compatibility program around O'Hare; and failure to obey the general requirement from Congress that jet noise be reduced to safe levels), to ask the fact finder to infer that

this negligence was more probably than not a substantial and material factor in causing the Plaintiff's injury.[1]

The Seventh Circuit's holding also ignores the rule of tort law that a defendant may be found negligent if its actions increased the risk of harm in general to a plaintiff as well as if it is found to have specifically caused the injury.

Fifth, the panel decision's holding that the Plaintiff had to prove that "air pressure waves arise only from aircraft under negligent control" violates the binding legal precedent that the burden of proof in civil cases is the preponderance of the evidence. *E.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003).

The plaintiff was entitled to the use of *the res ipsa loquitur* inference to survive summary judgment and at trial. "In Illinois, the plaintiff is *entitled* to a presumption of negligence under *res ipsa loquitur* if the 'thing which caused the injury is shown to be under the control or management of the party charged with negligence,' and if 'the occurrence is such as in the ordinary course of things would not have happened if the person so charged had used proper care.'" *Neace v. Laimans*, 951 F.2d 139, 141 (7th Cir. 1991) (emphasis added).

The plaintiff proved both requirements. First the Defendant federal government controls the system of jet noise control because it almost totally preempts the field of jet noise control. Pl.'s brief at 33-34; *City of Burbank v.*

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[1] *Kolakowski v. Voris*, 83 Ill.2d 388, 389 (1981) (introduction of some evidence of specific negligence does not bar the doctrine of *res ipsa loquitur* where the cause of the injury is not conclusively established).

Lockheed Air Terminal, Inc., 411 U.S. 624, 628-40 (1973) (in interpreting the Noise Control Act of 1972, 42 U.S.C. A. § 4901 *et seq.*, this Court held that the federal government – through the FAA and U.S. EPA – holds comprehensive control over aircraft noise, preempting state and local control, because of the pervasive nature of the scheme of federal regulation of aircraft noise).

Second, it is a very reasonable conclusion that in the facts and circumstances of the occurrence, the air pressure wave that hit the plaintiff was caused because the defendant was negligent in allowing it to happen in a residential neighborhood, on a normal evening, to a pedestrian walking along. Pl.'s brief at 34-35, Reply brief at 19. To find otherwise, one has to remove the air pressure wave hitting the ground from the circumstances of this case and place it into the theoretical realm, or the general realm, which tort law, including the Supreme Court precedent on proximate cause,[2] prohibits. The Seventh Circuit's holding also ignores the moral aspect of this case, where the injured person was the victim of clear non-reciprocal risk. *See* Dan B. Dobbs, The Law of Torts, Vol. 1, "Substitutes for Factual Evidence, Res Ipsa Loquitur, Estimating the Probabilities of Negligence" at 376 (2001):

> even where literal control is compromised, the nonreciprocal feature of res ipsa is often very prominent, as where the plaintiff is injured by an exploding soda bottle or a collapsing chair. The

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[2] *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U.S. 469 (1876) (the proximate cause of an injury is ordinarily a question for the jury, not a question of science or legal knowledge, and "is to be determined as a fact in view of the circumstances of fact attending it.").

> defendant may lack literal control in such cases, but the risk is a one way street. The nonreciprocal character of many res ipsa cases is not the function of a rule, but it is a characteristic that often appears and may suggest a moral basis for the inference when otherwise the case might be doubtful.

The panel decision holding also violates the way this Court applies the *res ipsa loquitur* doctrine, *e.g.*, *Johnson v. U.S.*, 333 U.S. 46 (1948) ("No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked, since the rule deals only with permissible inferences from unexplained events.") In *Johnson*, a seaman suffered injury when a block held by another above him fell on his head, with no specific evidence as to why it fell. *Id.* at 47-48. This Court wrote: "A man who is careful does not ordinarily drop a block on a man working below him. Some external force might conceivably compel him to do so. But where, as here, the injured person is not implicated (citation omitted), the falling of the block is alone sufficient basis for an inference that the man who held the block was negligent." *Id.* at 48. "The inquiry . . . is not as to possible causes of the accident but whether a showing that petitioner was without fault and was injured by the dropping of the block is the basis of a fair inference that the man who dropped the block was negligent. We think it is, for human experience tells us that careful men do not customarily do such an act." *Id.* at 50.

In this case, there were two gaps in the causal sequence, how exactly the air pressure wave was generated (from which planes and what physical track it took to the plaintiff's body), and how the defendant's breaches of its duty of care caused the generation of the air pressure wave from the plane(s), both of which can be reasonably inferred

from the circumstances of the event and plaintiff's evidence.

> In many cases the inference to be drawn is a double one, that the accident was caused in a particular manner, and that the defendant's conduct with reference to that cause was negligent. The inference of negligence may arise either where a definite cause is known, or where the accident is more or less a mystery, with no particular cause indicated. When a gasoline filling station mysteriously explodes, many possible explanations can be suggested, but the most likely one may be negligence on the part of those in charge. The plaintiff is not required to eliminate with certainty all other possible causes or inferences, which would mean that the plaintiff must prove a civil case beyond a reasonable doubt. All that is needed is evidence from which reasonable persons can say that on the whole it is more likely that there was negligence associated with the cause of the event that that there was not. It is enough that the court cannot say that the jury could not reasonably come to that conclusion.

W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts*, Circumstantial Evidence – Res Ipsa Loquitur, § 39, pp. 247-48 (5th ed. 1984). The plaintiff should have been allowed these two inferences to survive summary judgment because the elements as in the *Neace* case were met.

In the last sentence of the quoted passage from the opinion below, the Seventh Circuit panel also alludes to "negligent design of the airspace," something the plaintiff has not alleged in this case.

b. The Seventh Circuit decision is in conflict with other legal authority regarding the factors involved in a court's determination that the estimation of the probabilities of negligence in a case are enough to allow the use of the res ipsa loquitur doctrine at trial, specifically, the common knowledge required and the moral basis for its use in cases of clear non-reciprocal risk.

While the specific holdings in the Seventh Circuit panel decision are not in accord with this Court's precedent, underlying the opinions below may well have been the courts' concern as to whether enough common knowledge exists regarding how jet aircraft create air pressure waves through wake vortices and sonic boom shock waves, and their hesitance about the unstated moral basis for the use of *res ipsa loquitur* in this case.

However, reference to the latest tort law treatise by Prof. Dobbs, as well as making the affirmative choice to protect the public safety, answers these concerns. *See* passages quoted, *supra*. Dan B. Dobbs, The Law of Torts, Vol. 1, "Substitutes for Factual Evidence, Res Ipsa Loquitur, Estimating the Probabilities of Negligence" at 373, 376 (2001).

Other res ipsa cases which are analogous to this case include: *Leathem Smith-Putnam Nav. Co. v. Osby*, 79 F.2d 280 (7th Cir. 1935) (res ipsa loquitur applicable in case of

explosion on shipping vessel where owner shown by circumstantial evidence to have allowed explosive gases to accumulate in dangerous quantities, with no evidence anything else that might explode); *Duerr v. Consol. Gas Co. of N.Y.*, 86 App. Div. 14, 835 NY Supp. 714 (1st Dep't 1903) (brick fell on head of pedestrian and court held res ipsa loquitur applied, because bricks handled properly do not fall on the heads of pedestrians). *Viera v. Atchison, Topeka & Santa Fe Railway Co.*, 10 Cal. App. 267, 101 P. 690 (1909) (it was reasonable to infer negligence from the fact that soon after a train passed a fire started beside the track).

2. The Seventh Circuit decision is in conflict with the decisions of this Court regarding whether a proposed amendment to a negligence complaint which changes the manner of the breach of duty of care to conform to the evidence and anticipate the use of res ipsa loquitur at trial constitutes a "new claim" barred by Fed. R. Civ. Pro. 15.

The first paragraph of the Seventh Circuit decision contains major and fundamental errors in summarizing plaintiff's case and denies plaintiff the ability to develop her case beyond the complaint.

The statement, "because she says employees of the Federal Aviation Administration (FAA) at O'Hare caused her injury by negligently directing a plane to fly too low over her neighborhood", Panel Decision at 1-2, is not supported by citation to the record, and is wrong in the following ways. Plaintiff nowhere limited her case to "employees of the FAA at O'Hare", and nowhere in her case did she ever limit the negligence allegations against

the federal government to "directing a plane to fly to low over her neighborhood."

From the beginning of this case, the defendant had notice that this case involved how the FAA guided planes around O'Hare in relation to the safety of persons on the ground in the surrounding suburbs, and involved their hearing in relation to air pressure waves caused by planes, albeit focused on one specific United plane.

The plaintiff's description of the occurrence in her initial complaint was "the defendant agency's air traffic controllers negligently and wrongfully guided a United Airlines jet airplane taking off from O'Hare Airport in the air over the plaintiff and allowed it to cause a great noise disturbance over this highly populated residential area. This noise disturbance was so great that it involved an air pressure wave powerful enough to actually have struck the entire right side of the plaintiff's body, and thereby caused physical injury to her." Pl.'s 7th Cir. Appdx. at 13.

The panel decision failed to recognize that the "great noise" referenced in the complaints is the same as the "air pressure wave," stated in the next sentence of all the complaints, the first phrase being just a broader set with "air pressure waves" as a subset. This is clear from the plain language of the complaints.

The plaintiff's description of the occurrence in her 1st Amended Complaint, which superseded the initial complaint, and governed most of the discovery period of this case, contained the same concepts but added "and other staff" to emphasize that other FAA staff besides air traffic controllers were involved in the system of how the FAA guides planes in relation to how they create air pressure

waves. That description is: "the FAA's air traffic controllers and other staff negligently and wrongfully directed and guided a United Airlines jet airplane taking off from O'Hare Airport in the air over the plaintiff and allowed it to cause a great noise disturbance over this highly populated residential area. This noise disturbance was so great that it involved an air pressure wave powerful enough to actually have struck the entire right side of the plaintiff's body, and thereby caused physical injury to her." Pl.'s 7th Cir. Appdx. at 14.

After the close of discovery and in conjunction with responding to Defendant's motion for summary judgment, Plaintiff submitted a motion for leave to file a second amended complaint in order to make the complaint conform with the evidence, which was denied. Pl.'s Brief at 8-16.

The evidence included that in addition to confirming the United plane flew over plaintiff as she documented over a year earlier – making her testimony highly credible to the fact finder – there were a line of planes landing near her, as well as the possibility of a military jet(s) flying overhead, since those were excluded by the FAA from the flight data held by the City of Chicago's Dept. of Aviation. Pl.'s brief at 9-10, Pl.'s Ex. H.

It also included information showing the plausibility of planes causing air pressure waves through the action of wake vortices an sonic boom shock waves in general, and the defendant's knowledge of these facts. Pl.'s Ex. V, second document citied in Pl.s Supp. Mem. at 4-5 n.1, Pl,'s brief at 14-15 n. 9 citing Def.'s Ex. 4, Reply, FAA Advisory Circular on Aircraft Wake Turbulence, filed 3/16/04.

Since plaintiff was unable to determine what specific way the air pressure wave that hit her was caused by the planes in the air around her that evening, she submitted her request to rely on the *res ipsa loquitur* doctrine to cover the gap in proof of causation in her response to defendant's motion for summary judgment (not "in this Court" as the panel decision states – the plaintiff never changed her testimony as to the event; she only changed the allegation as to how the air pressure wave was specifically caused), that gap specifically involving exactly which planes and the specific physics and mathematical equations explaining how the air pressure wave was generated by the plane(s).

The plaintiff's proposed second amended complaint contained this description: "the FAA's air traffic controllers and other staff negligently and wrongfully operated the FAA's aircraft regulatory activities so as to allow the airplanes in Plaintiff's vicinity to create a great noise disturbance over her in this highly populated residential area. This noise disturbance was so great that it caused an air pressure wave powerful enough to actually have struck the entire right side of the plaintiff's body, and thereby caused physical injury to her." Pl.'s 7th Cir. Appdx. at 16.

This changed the theory of the United plane causing the air pressure wave to the general negligence allegation involving any or all of the planes in plaintiff's vicinity that night, but it did not change the concept that the FAA staff negligently and wrongfully allowed planes to cause the air pressure wave -- the systemic aspect of jet noise control ("noise" including air pressure waves). Defendant was on notice that this case involved the FAA's system of jet noise control from the beginning, from the complaint as well as

from the plaintiff's discovery requests, so there was no prejudice from this change. Pl.'s brief at 12.

Throughout the panel decision, the rest of plaintiff's negligence case was entirely disregarded. Plaintiff submitted at least four specific allegations of negligence on the systemic aspects of jet noise control, which increased the risk of harm to plaintiff. Pl.'s brief at 34-36, Reply brief at 20-25, Pl.'s Response to Sum. Judgmt. at 11-13. For the court to so limit the plaintiff's entire case to the specific content of her first amended complaint was equivalent to denying her the ability to develop the case, in violation of the notice pleading standards. *E.g., Smith v. Piper Aircraft Corp.*, 18 F.R.D. 169, 175 (D.C. Pa. 1955) ("there is no rule of law which freezes the further development of the case within the limits of plaintiff's knowledge when she filed the complaint").

Here, the operative facts involved the air pressure wave hitting the plaintiff as she walked home one night in her neighborhood, causing her hearing damage (severe pain and lasting tinnitus). The cause of action was always negligence, involving how the FAA guided planes in relation to the protection of people on the ground. A plaintiff may substitute one legal theory for another without altering the complaint. *Mayle v. Felix*, 162 L. Ed. 2d 582, 595 n. 5 (2005) (adding a new legal theory to a complaint – a fraud charge – based on the same operative facts as those initially plead, was properly allowed).

This Court has specifically held that an amendment to a complaint which changes the manner of breach of duty does not constitute a new cause of action. *Tiller v. Atlantic Coast Line*, 323 U.S. 574, 581 (1945) (changing the specific forms of negligence alleged as cause of death of

railroad yard worker did not state a new cause of action); *Maty v. Grasselli Co.*, 303 U.S. 197, 199 (1937) (an amendment broadening the place of employment where the injury occurred did not change the plaintiff's cause of action).[3]

The Seventh Circuit's holding limiting the plaintiff here to the exact content of her original complaint also violates this Court's rule in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), that the imposition of heightened pleading standards – those of greater specificity – is prohibited, absent statutory requirements (which do not exist for Federal Tort Claims Act cases).

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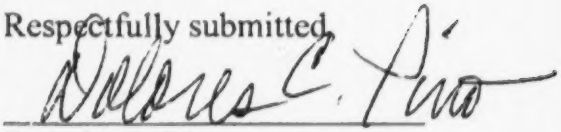
[3] *See also, e.g., Blair v. Durham,* 134 F.2d 729, 731 (6th Cir. 1943) (amendment changing negligence allegation from use of scaffold to construction of scaffold did not state different cause of action because allegations were only different breaches of the same duty), *Humphries v. Going*, 59 F.R.D. 583, 587 (D.C.N.C. 1973) (although amendment to complaint must not introduce a cause of action substantially different, an alteration of modes in which defendant has breached a legal duty or caused an injury is not an introduction of a new cause of action); *Davis v. Yellow Cab Co.*, 35 F.R.D. 159, 161 (D.C. Pa. 1964) (as long as a plaintiff adheres to a legal duty breached or an injury originally declared on, an alteration of the modes in which defendant has breached the legal duty or caused the injury is not an introduction of a "new cause of action"; the true test is whether the proposed amendment is a different matter or the same matter more fully or differently laid); *Smith v. Piper Aircraft Corp.*, 18 F.R.D. 169, 175 (D.C. Pa. 1955) (an alteration of the modes in which defendant has breached a legal duty or caused an injury is not an introduction of a new cause of action).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,



Dolores C. Pino,
Petitioner *pro se*

May 4, 2006

APPENDIX

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 3, 2006

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. ANN CLAIRE WILLIAMS, Circuit Judge

No. 05-3255

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

DOLORES C. PINO
Plaintiff-Appellant
v.
UNITED STATES OF AMERICA
Defendant-Appellee.

No. 03 C 7466

ORDER

On consideration of plaintiff-appellant's petition for rehearing *en banc*, filed in the above-captioned case on January 17, 2006, no judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 29, 2005*
Decided November 30, 2005

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 05-3255

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

DOLORES C. PINO
Plaintiff-Appellant
v.
UNITED STATES OF AMERICA
Defendant-Appellee.

No. 03 C 7466

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* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a)(2).

ORDER

Dolores Pino, a resident of Morton Grove, Illinois, believes that in February 2001, while she was walking near her home, an airplane in the Chicago/O'Hare airspace created an atmospheric disturbance that caused her to suffer from severe tinnitus – a ringing sensation in the ears. She is suing the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (FTCA), because she says employees of the Federal Aviation Administration (FAA) at O'Hare caused her injury by negligently directing a plane to fly too low over her neighborhood. The district court granted summary judgment in favor of the United States, and Pino appeals that order as well as an order denying her leave to file a second amended complaint. We affirm.

We review de novo whether the district court was correct that Pino failed to present evidence of a genuine issue of material fact. *Cont'l Cas. Co. v. Nw. Nat'l Ins. Co.*, 427 F.3d 1038, 1041 (7th Cir. 2005). To state a claim under the FTCA, Pino must show that the FAA owed her a duty and, through its breach of that duty, proximately caused her injury. 28 U.S.C. § 1346(b)(1); *Bajwa v. Metro. Life Ins. Co.*, 804 N.E.2d 519, 526 (Ill. 2004). Pino argues that the district court erroneously failed to regard her personal affidavit as sufficient to defeat summary judgment. In the affidavit, Pino asserts that the following is evidence of FAA negligence: a United plane flew over her making a loud noise, at the same moment she was hit by an "air pressure wave," and after this incident she experienced tinnitus. But in this Court, Pino expressly denies that this United plane caused her injury.

Instead she argues in her brief that an unknown aircraft caused her tinnitus and that she need not identify a specific plane that caused her injuries because an air pressure wave (which arguably did injure her) had to have been generated by a negligently controlled aircraft. While we must draw all reasonable inferences from the evidence in Pino's favor, *Cont'l Cas. Co.*, 427 F.3d at 1041, we do not think the causation sequence that Pino suggests is one that a layperson can reasonably infer based on personal experience, *Payne v. Pauley*, 337 F.3d 767, 772 (7th Cir. 2003) ("although personal knowledge may include reasonable inferences, those inferences must be grounded in observation or other first-hand personal experience. They must not be flights of fancy, hunches, intuitions, or rumors . . . .") (internal citation and quotation marks omitted). Pino has not asserted that she is an expert on the causes of air pressure waves, nor has she presented an expert witness to say that air pressure waves arise only from aircraft under negligent control. Therefore, the district court's grant of summary judgment was correct.

Pino also argues that the district court should have allowed her to amend her complaint to include a new claim that the FAA negligently designed the flight paths around her neighborhood. The district court found Pino's proposed amendment would be untimely, prejudicial, and futile. These are all valid grounds for refusing leave to amend, *Dubicz v. Commonwealth Edison Co.*, 377 F.3d 787, 792 (7th Cir. 2004), and we agree with the district court that Pino's proposed amendment would be futile, although for slightly different reasons than the court stated. Pino, after having over a year to conduct discovery, failed to present any competent evidence that a plane caused her injury. In the absence of such evidence of causation, Pino is just as unable to prove that her injury was caused by the FAA's

negligent design of the airspace as she is unable to prove that it was caused by the FAA's negligent guidance of planes.

Accordingly we AFFIRM the district court's decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOLORES C. PINO	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 03 C 7466**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Dolores Pino has filed a pro se complaint under the Federal Tort Claims Act in which she alleges that on February 5, 2001, she was in Morton Grove, Illinois walking south from Golf Road on Harlem Avenue, "when the FAA's air traffic controllers and other staff negligently and wrongfully directed and guided a United Airlines jet airplane taking off from O'Hare Airport in the air over plaintiff and allowed it to cause a great noise disturbance over this highly populated residential area.." First Am. Compl. ¶ 3. The disturbance was so great, Pino says, that "it involved an air pressure wave powerful enough to actually have struck the entire right side of the plaintiff's body, and thereby caused physical injury to her," including damaging her hearing. *Id.* ¶¶ 3, 5.

The government has moved for summary judgment. The Court may grant the motion only if there is no genuine

issue as to any material fact and the government is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In asserting the government's motion, the Court views the facts in the light most favorable to Pino and draws reasonable inferences in her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The government is liable to Pino under the FTCA if, under the circumstances, a private person would be liable to her under the law of Illinois, where the allegedly negligent act occurred. 28 U.S.C. § 1346(b). Under Illinois law, to sustain a claim for negligence, Pino must show that the government owed her a duty of care and breached the duty, proximately causing her injury. *See, e.g., Curatola v. Village of Niles*, 154 Ill.2d 201, 207, 608 N.E.2d 882, 885 (1993).

Pino has offered no evidence that anything that any air traffic controller did caused her injury. Pino's claim in her complaint was that air traffic controllers permitted a United Airlines jet to fly too low over her neighborhood and that this caused her injury.[1] In her response to the government's motion, however, Pino disavows the claim that the air pressure wave was caused by the United Airlines jet, suggesting that it must have been caused by some other aircraft that passed overhead earlier or that was traveling greater than the speed of sound. *See* Pl. L.R. 56.1(b)(3)(A)

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[1] Pino now concedes that the United Airlines jet that she originally claimed caused the air pressure wave was at an altitude of over 6300 feet at the time she claimed to have been injured. Pl. Ex. F. The Federal Aviation Administration's departure procedures for O'Hare Airport require an aircraft to be at least 3000 feet above mean sea level – around 2300 feet above ground – by the time it passes Pino's neighborhood. *See* Def. Ex. 2 at 6. Thus the jet was well above the minimum altitude.

Stmt. ¶ 5. But Pino's speculation over possible causes does not qualify as evidence. "Inferences ... supported by only speculation or conjecture will not defeat a summary judgment motion." *McDonald v. Village of Winnetka*, 371 F.3d 992, 1001 (7th Cir. 2004).

At this stage of the case, Pino must provide evidence that would enable a fact finder to find in her favor at trial. All that Pino offers on this score is the following:

> The Plainff was unable to reconstruct exactly how the aircraft created the air pressure wave, but based on communications with jet noise experts, the two likely modes are "wake vortices" from the wings or a military jet flying over at or above the speed of sound which created a sonic boom.

Pl. Affid. ¶ 18. Though it is possible that Pino is correct about the likely cause of the air pressure wave, her affidavit does not suffice to create a genuine issue of fact. To be considered in connection with a motion for summary judgment, evidence must be admissible in content. Specifically, an affidavit must be based on personal knowledge in order to be considered. *See, e.g., Juarez v. Menard, Inc.*, 366 F.3d 479, 484 n. 4 (7th Cir. 2004). The statement in Pino's affidavit about the possible causes of the air pressure wave concededly is not based on her personal knowledge – rather it is based on hearsay statements from unnamed individuals.

Pino says that the only thing capable of causing an air pressure wave of the type she says hit her is an aircraft, and that because an aircraft must have been involved, the FAA is responsible. She says in her response to the motion for summary judgment that her claim may be sustained under

the doctrine of *res ipsa loquitur*. *See* Pl. Mem. at 9. But to establish *res ipsa loquitur* under Illinois law, a plaintiff must show that he or she was injured in an occurrence that ordinarily does not happen in the absence of negligence, and by an agency or instrumentality within the defendant's exclusive control. *See Dyback v. Weber*, 114 Ill.2d 232, 242, 500 N.E.2d 8, 12 (1986). Pino does not have evidence sufficient to permit a finding in her favor on either of these points. Her own statement that her injury was caused by an air pressure wave amounts to unsupported surmise, and in any event she has no evidence that air pressure waves ordinarily do not reach the ground unless someone is negligent. Finally, it is questionable whether the FAA's provision of air traffic control services puts it in exclusive control of aircraft within the meaning of the doctrine of *res ipsa loquitur*.

For these reasons, the Court concludes that the evidence, even when viewed in the light most favorable to Pino, would not support a decision in her favor under the FTCA. The government is therefore entitled to summary judgment.

In her response to the motion for summary judgment, Pino asked the Court to permit her to amend her complaint to add a claim that the FAA was negligent in its regulation of aircraft noise around O'Hare Airport. *See* Pl. Mem. 8. The Court denies this request. The request is untimely, as it comes long after the close of discovery, and the government would be unfairly prejudiced were it to now defend against entirely new allegations. In any event, the amendment would be futile, as the FTCA contains an exception for discretionary functions, 28 U.S.C. § 2860(a), which would bar any claim regarding the design of departure routes from O'Hare Airport. *See, e.g., West v.*

Federal Aviation Admin., 830 F.2d 1044, 1048-49 (9th Cir. 1987); *Colorado Flying Academy, Inc. v. United States*, 724 F.2d 871, 876-77 (10th Cir. 1984).

Conclusion

For the reasons stated above, the Court grants the government's motion for summary judgment [docket #25-1]. The Court denies plaintiff's motion for denial of the motion for summary judgment [docket #39-1]. Plaintiff's motion to shorten deadline and to compel answer [# 27-1 & 2] was dealt with by Judge Lefkow and is terminated as moot. The Clerk is directed to enter judgment in favor of the defendant.

MATTHEW F. KENNELLY
United States District Judge

Date: May 2, 2005

Federal Rule of Civil Procedure 15 (in relevant part):

(a) Amendments. . . . a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when ... (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading....